89-1947 (1)

No. _____

IN THE

Supreme Court of the United States

October Term 1989

John Remington Graham,

Petitioner

vs.

William J. Wernz, Director
of the Office of Lawyers
Professional Responsibility
for the State of Minnesota,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

1. Whether, in light of the Petition Clause of the First Amendment as applied to the several States of the Union, a state supreme court can discipline a member of its bar for peaceably and politely filing petitions with public officers of the United States, as prescribed in acts of Congress, seeking redress of grievances, where there is no allegation or finding that the lawyer involved gave any public speech or held any press conference or did anything but call his concerns to the attention to the federal government, in an effort to protect himself, his profession, and his family,

-- In other words, whether, as ordained in the English Bill of Rights of 1689, such lawyer enjoys an absolute immunity under those circumstances, not necessarily against suits at common law by third persons, but at least against penal proceedings or prosecutions instituted by his government or some

magistrate thereof to punish him for the very words of his remonstrances.

2. Whether, in light of First and Fourteenth Amendments to the United States Constitution, a state supreme court can discipline a member of its bar for criticism of the integrity of two judges, a public prosecutor, and their associates, where

-- Such state supreme court has adopted word for word Rule 8.2 of the American Bar Association Model Rules, which prohibits such criticism with "reckless disregard for the truth," and was drafted in light of Garrison v. Louisiana, 279 U. S. 64 at 74-75 (1964);

-- Such lawyer has been charged in the operative language of such Rule 8.2, and only such Rule 8.2; and

-- The referee appointed by such state supreme court, after hearing, makes a finding, uncontested by both sides, that, as to his

objectionable statements, such lawyer "did feel this way, and the referee is satisfied that his feelings were genuine."

3. Whether, in light of the Due Process Clause of the Fourteenth Amendment, a state supreme court can punish a member of its bar for professional infractions on the basis of findings deemed conclusive against him, even though he has not been served with those findings as expressly and literally required by applicable rules of procedure before the time for ordering a transcript to challenge such findings can begin to run.

4. Whether, in light of the Due Process Clause of the Fourteenth Amendment, a state supreme court can punish a member of its bar for ethical violations not described in the disciplinary complaint against him in the operative language of ethical rules as adopted.

5. Whether, in light of the Due Process Clause of the Fourteen Amendment,

a state supreme court can punish a member of its bar for acts which have not been described in any manner in the disciplinary complaint against him, and of which he has never been charged and convicted.

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PETITION FOR WRIT OF CERTIORARI

Comes now your petitioner, and he shows this court the following particulars, to wit:

JURISDICTION

Your petitioner seeks reversal of a judgment and decree of the Minnesota Supreme Court, taking the shape of an opinion and order entered on March 23, 1990, in Matter of Graham, No. C3-88-1760, reproduced in

full with footnotes in Appendix A hereof.

An order for denying a petition for rehearing was entered on May 1, 1990, and is reproduced in Appendix C hereof.

Jurisdiction to review this cause on writ of certiorari is premised on Section 1257(a) of 28 United States Code, insofar as it permits review on such writ of the final judgment or decree of the highest court of a State whenever any right, privilege, or immunity is specially set up or claimed under the United States Constitution, as well as Section 2001(c) of 28 United States Code, together with Rule 13 of the Rules of the United States Supreme Court, which, as applied to the circumstances of this cause, allow petitioning at any time before the expiration of 90 days following May 1, 1990.

CONSTITUTIONAL PROVISIONS

The provisions of the United States Constitution involved in this cause are the First Amendment insofar as it says that there

shall be no law "abridging the freedom of speech, or of the press," or the right of the people "to petition the Government for redress of grievances," and the Fourteenth Amendment insofar as it says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This cause arose within the original jurisdiction of the Minnesota Supreme Court on a disciplinary complaint reproduced haec verba in Appendix D hereof, and filed on August 17, 1988, by the the respondent, as director of lawyers professional responsibility in Minnesota, against the petitioner, a member of the Minnesota Bar since October 20, 1967, charging him in four counts with impugning the integrity of a state district judge (Spellacy), a federal magistrate (McNulty),

a county attorney (Rathke), and counsel for such county attorney in federal court (Milligan), with "reckless disregard for the truth," contrary to Rules 8.2(a), 3.1, and 8.4(d) of the Minnesota Rules of Professional Conduct (MRPC), which correspond exactly to and were adopted word for word from Rules 8.2(a), 3.1, and 8.4(d) of the American Bar Association Model Rules of Professional Conduct (ABARPC), as adopted by the American Bar Association House of Delegates on August 2, 1983. This derivation is not disputed, is obvious from comparison of texts, and has been acknowledged in the April, 1984, issue of Bench and Bar, which is the magazine of the Minnesota State Bar Association.

Rule 8.2(a) prohibits statements of a lawyer impugning the integrity of a judge or public legal officer with "reckless disregard for the truth." Rule 3.1 prohibits a lawyer from asserting "frivolous claims

or defenses" in legal proceedings. Rule 8.4(d) prohibits conduct of a lawyer which is "prejudicial to the administration of justice." The operative language of Rule 8.2(a), but not of Rules 3.1 and 8.4(d), is used in the disciplinary complaint against the petitioner.

The disciplinary complaint refers to statements made in three documents which are identified as exhibits 3, 4, and 5, and reproduced in Appendix D hereof as integral parts of the accusation.

Exhibit 3 is a letter of February 16, 1988, from the petitioner to the United States Attorney in Minnesota, reporting facts or claims in fulfillment of what the petitioner conceived as his duty under 18 U. S. C., Section 4, lest he be guilty of misprision of felony. He claimed that Spellacy, Milligan, and Rathke were guilty of obstruction of justice or conspiracy to obstruct justice, and asked for an impartial

FBI investigation.

Exhibit 4 is a complaint, verified by the petitioner on March 22, 1988, and addressed to the Chief Judge of the United States Court of Appeals for the Eighth Circuit, under the so-called Judicial Disability and Conduct Act, 28 U. S. C., Section 372(c). He claimed that McNulty was guilty of conduct prejudicial to the administration of justice and asked for reference to the judicial council for investigation.

This record discloses no allegation or finding that the petitioner disseminated these documents in a public manner, or did anything other than file them confidentially with public officers of the United States, as prescribed by acts of Congress, for purposes of securing desired investigations, and prosecutions if facts disclosed by such investigations so warranted. These documents were made public, not by the petitioner, but by the respondent when he filed the disci-

plinary complaint in this matter.

Specifically, these documents make reference to the case of Shockman v. Rathke, No. CV-5-87-260 on the docket of the United States District Court for Minnesota, which was a suit in equity sued out by the petitioner in behalf of a client, and seeking to enjoin Rathke from prosecuting said client for simple assault, claiming that the proceedings against him were vindictive, as in Duncan v. Perez, 445 F. 2d 557 (5 Cir. 1971).

A motion was made by petitioner on December 9, 1987, before McNulty for allowance of an amended complaint and for temporary injunction, as appears of public record in United State District Court File No. CV-5-87-260, reproduced as exhibit 3 attached to respondent's item 22 in Minnesota Supreme Court File No. C3-88-1760. Over objection of Milligan based mainly on grounds of abstention, as appears from his opposition papers

in federal court, which have been reproduced as exhibit 4 attached to respondent's said item 22, an amended complaint was allowed and early trial was ordered in lieu of a temporary injunction.

In exhibits 3 and 4 attached to the disciplinary complaint against him, the petitioner alleged that, with Rathke's knowledge and consent, Milligan contacted Spellacy who contacted McNulty, at some point between December 9 and 11, 1987, and thereby secured a predetermined result, including a commitment to assess attorney's fees under Rule 11, FRCivP. He alleged that this corruption caused McNulty's subsequent holding that abstention was a bar, contrary to principles announced a few weeks later in Lewellen v. Raff, 843 F. 2d 1103 (8 Cir. 1988), as well as his findings denouncing the petitioner and his order dismissing suit against Rathke on January 21, 1988. These are the claims which were alleged in the discipli-

nary complaint to have been made by the petitioner with reckless disregard for the truth.

Exhibit 5 is an affidavit sworn by the petitioner on May 24, 1988, and filed by petitioner's counsel in Rule 11 proceedings, a well known and eminent practitioner in Minnesota, to support his motion for the recusation of McNulty, as precribed in 28 U. S. C., Section 455.

The said exhibit 5 makes essentially the same statements as the said exhibits 3 and 4 attached to the disciplinary complaint against the petitioner.

This record discloses no allegation or finding that the petitioner made any public comment concerning this affidavit, or that it became public in any other manner than filing by his counsel in the clerk's office of the federal district court according to statute.

In Appendix E hereof, two orders are

reproduced from the record in the said case of Shockman v. Rathke: these show that the motion for recusation of McNulty was granted on April 19, 1988, and that motion to assess attorney's fees against the petitioner was denied on the merits on June 29, 1988.

In answer to the disciplinary complaint against him, the petitioner pleaded general, specific, and special denials, as well as various affirmative defenses, including absolute privilege based on his constitutional right under the First Amendment to petition the government for redress of grievances, qualified privilege based on his constitutional right under the First Amendment to enjoy freedom of speech and press. He pleaded that he was not guilty of reckless disregard for the truth within the meaning of Rule 8.2(a), that his claims were well founded in evidence, and, in any event, that his claims were made honestly and in good faith.

Additionally, he set forth various pleas in justification, describing the evidence on which he had relied in making the statements complained of in the said exhibits 3, 4, and 5 attached to the disciplinary complaint, frequently making reference to various public depositions and transcripts in the possession of the respondent acting as disciplinary prosecutor. These pleas in justification have been reproduced in Appendix F hereof, and describe the petitioner's side of the story, which, despite claims to the contrary, he has never retracted or qualified. He adds that not only this but further evidence was brought on in the hearing before the referee appointed by the Minnesota Supreme Court on December 13-15, 1988, and the main part of the whole body of evidence on which he relied has been summarized on pages A15-A73 of his appendix of record in Minnesota Supreme Court File No. C3-88-1760.

The referee returned his findings on

February 21, 1989. His specific findings are summarized in the per curiam opinion and order reproduced in Appendix A hereof.

The referee also made, on the same day, certain general findings, which have been reproduced in Appendix B hereof. The referee found that there were no crimes such as the petitioner had alleged, that the petitioner's statements were false and damaging, that his statements were a reaction against imagined wrongs against him, that the petitioner was in so many words foolish and imprudent, and that he was egotistical to believe in such a conspiracy as he had alleged, -- yet, as to the statements mentioned in the disciplinary complaint as having been made with reckless disregard for the truth, the referee found that the petitioner "did feel this way, and the referee is satisfied that his feelings were genuine."

The referee concluded that the petitioner was guilty as charged, and recommended that he be disciplined by suspension from

practice in state courts of Minnesota for 60 days, provided he not be reinstated in any event until he has passed the professional responsibility portion of the state bar examination, and has paid costs and disbursements which have since been taxed.

The petitioner desires to contest the findings for evidentiary insufficiency, insofar as the record as it stands should be adjudged not enough to acquit him, and to the extent that the findings are adverse to him, or contrary to his pleas in justification.

In Minnesota, lawyer discipline cases are governed by distinct rules of procedure which are known as the Minnesota Rules of Lawyers Professional Responsibility (MRLPR).

Rule 14(e), MRLPR, says,

> "The referee shall make findings of fact, conclusions, and recommendations, file them with this court, and notify the respondent and the director of them. Unless the respondent or director, within ten days, orders a transcript and so notifies the court, the findings of fact and conclusions shall be conclusive."

And MRLPR Rule 1(8) says,

> "'Notify' means to give personal notice or to mail to the person at the person's last known address or the address maintained on this court's attorney registration records."

It is undisputed that the referee has never given personal notice of his findings to the petitioner, who, of course, was designated as "respondent" in the lawyer discipline proceedings below in Minnesota Supreme Court File No. C3-88-1760. Nor is there any certicate, affidavit, or other evidence, neither does anyone maintain that the petitioner was ever notified by the referee by mail to his last known address, or by mail to his registered address, as expressly and literally specified in MRLPR 1(8).

At the same time, the petitioner concedes that the referee sent a copy of the findings to his counsel who received them on February 24, 1989, and that an attempt was made to settle this matter. The settlement fell through when the respondent, as disci-

plinary prosecutor, insisted that the findings were conclusive, because more than ten days had passed after February 24, 1989, and no transcript of the referee hearing had been ordered.

The petitioner objected to this, because he considers those findings false or misleading in all material respects, -- because he considers them clearly and demonstrably erroneous by reference to evidence admitted before the referee, and even to documents already of record without the transcript, -- because he will not concede what he believes to be untrue, -- and because he has never been served personally or by mail as required by MRLPR Rules 1(8) and 14(e) before the ten days foreclosing his right to challenge those findings can even begin to run.

The petitioner did not receive a copy of the findings in the mail, until April 11, 1989, when his counsel sent him a copy upon

learning the referee had failed to do so, as appears more fully on pages A102-A109 of his appendix in Minnesota Supreme Court File No. C3-88-1760. It there appears further that, by order of April 7, 1989, the petitioner was directed to make his written submissions. Accordingly, he made submissions without transcript of the referee hearing, but made a motion on April 29, 1989, for permission to order a transcript so as be able to challenge the findings handed down against him His motion has been reproduced in material part in Appendix G hereof.

The petitioner claimed that he was entitled to summary dimissal of proceedings against him, because, on the face of the record such as it is, it is not disputed that the statements complained of were part of three peaceable and respectful petitions to his government for redress of grievances, all filed as prescribed by law, and that he neither made any public speech nor held any

press conference, nor published abroad in writing, -- and that, therefore, he enjoyed an absolute immunity under the First Amendment, not necessarily against civil suits of third persons, but against penal proceedings or prosecutions instituted by government or any magistrate of government.

He also claimed that, on the face of the record such as it is, including the findings of the referee, he was entitled to summary dismissal, because it was not disputed that the statements complained of were made honestly and in good faith: this, he claimed, entitled him to acquittal, because he was not guilty of reckless disregard for the truth within the meaning of Rule 8.2(a), as properly interpreted in light of its phrasing and origins, and in light of constitutitonal guarantees of freedom of expression and of due process of law.

A formal motion for summary dismissal was submitted by the petitioner on June 6,

1989. By order of November 17, 1989, reproduced in Appendix H hereof, the Minnesota Supreme Court denied the petitioner's motion for summary dismissal.

By opinion and order of March 23, 1990, reproduced in Appendix A hereof, the Minnesota Supreme Court held that the findings of the referee were conclusive against the petitioner, that the petitioner enjoyed no absolute immunity, that the decisions of the United States Supreme Court on public figure libel actions and criminal defamation prosecutions do not govern lawyer discipline proceedings under MRPC Rule 8.2, that honesty and good faith were no defense, that he should be punished for violations of MRPC Rule 3.1 and 8.4(d) even though the operative language thereof does not appear in the disciplinary complaint, that the petitioner should receive more severe treatment because he filed remonstrances not mentioned in the disciplinary complaint against him nor ever

found wrongful after notice and hearing, and that the discipline recommended by the referee should be imposed.

The petitioner then filed a timely petition for rehearing to clarify his position that he is entitled to a literal reading of MRLPR Rules 1(8) and 14(e) as a matter of Due Process under the Fourteenth Amendment, that he is entitled to a reading of MRPC 8.2(a) according to decisions of the United States Supreme Court as a matter of Due Process under the Fourteenth Amendment, that he cannot be found guilty of violations of Rules 3.1 and 8.4(d) as a matter of Due Process under the Fourteenth Amendment, that he cannot be punished for remonstrances or acts unmentioned in the disciplinary complaint as a matter of Due Process under the Fourteenth Amendment, and that as previously asserted he is entitled to summary dismissal on both absolute and qualified immunities under the First Amendment.

The petition for rehearing was denied the Minnesota Supreme Court by order of May 1, 1990, reproduced in Exhibit C hereof, whence this petition for writ of certiorari was filed well within 90 days of May 1, 1990.

REASONS WHY THE WRIT SHOULD BE GRANTED

Certiorari should be granted, because the result below flies in the face of the major decisions and openly defies the moral authority of this court, -- because reclarification is needed of those decisions lest they continue to be ignored or disregarded or misinterpreted or otherwise circumvented by courts of lesser standing, -- because intervention is requisite to prevent grave injustice to the petitioner, -- because intervention is necessary to protect the independence of the bar, -- and, most importantly, because intervention is needed to reassure citizens of every description of their right to petition their government peaceably for redress of grievances without

being prosecuted in proceedings designed to punish their timerity in asking for assistance or reform or redress or improvement in public affairs.

Let us quickly consider in outline form the points which the petitioner intends to argue and expound in greater detail, replete with full review of all relevant sources of legal history from the Glorious Revolution through the First Congress, as well as careful discussion of important legal articles and court decisions on the subject, once the writ has issued:

1. In 1687 King James II issued certain declarations of indulgence which purported to suspend certain acts of Parliament. The principal archbishop and six other reverend prelates of the established church petitioned his Majesty, claiming that he had no royal power to suspend statutes wholesale. James II in privy council found this remonstrance not to his liking, and, therefore,

caused the gentlemen approaching him with their grievances to be charged on information with seditious libel.

The trial on this accusation is one of the most celebrated causes in legal history and is reported as the Seven Bishops Case, 12 How. St. Tr. 183 (K. B. 1688). The chief justice and two puisne justices instructed the jury on doctrines of the Star Chamber, -- in other words, that the presentation of the petition was a publication, that libel or no libel was a matter of law, that truth was no defense, and that honesty and good faith were no defense, and so on.

Dissenting in his instructions was Justice Powell, for whom Lord Camden later expressed the highest praises, and who advised the jury in substance that there could be no criminal libel unless the writing was shown to the satisfaction of the jury to have been published, false, malicious (i. e., known to be false, or seriously doubted), and defama-

tory or seditious.

The jury found for the seven bishops, and this triggered the Glorious Revolution. There was a Convention Parliament which settled the Crown, then passed the Act of 1 William & Mary, Session 2, Chapter 2, including the famous English Bill of Rights of 1689, which was presupposed in the American Constitution and obviously considered important during the framing of the First Amendment. See, e. g., Hamilton in the 84th Federalist, pages 512-513 of the Mentor Edition of 1961, and the debates in the United States House of Representatives on August 15, 1789, as recorded in Volume 1 of Gales & Seaton's Annals of Congress, pages 731-748.

The 5th Article of the English Bill of Rights of 1689 reads, "It is the right of the subject to petition the King, and all commitments or prosecutions for such petitioning are illegall." (emphasis added) No mention was made of freedom of speech or

or press, which was left for later development, nor was there an immediate concern at the time to protect those petitioning as against suits at common law brought by third persons claiming to have been injured.

Yet, it was then and there established forever that there is an absolute immunity to be enjoyed by a subject or citizen petitioning his government peaceably and politely, according to legal custom or as prescribed by statute, -- an absolutely immunity, not against every legal consequence, for nobody should or does enjoy such protection, -- but an absolute immunity at least against penal proceedings or prosecutions of the type which had been brought against the seven bishops. There is no respectable jurist or scholar who ever said the contrary over the past three hundred years.

If a citizen petitions his government for redress of grievances, and he does so peaceably, politely, and lawfully, then he

may never been punished in any proceedings instituted against him by any magistrate of government in retaliation for what he has said. It does not matter what his frame of mind was or what his government claims his frame of mind was. A citizen can petition his government without ever being punished by his government. That much was ordained for all time by the 5th Article of the English Bill of Rights of 1689, and was intended by the Framers of the First Amendment.

There are three main decisions of this court on which the petitioner relies. The first is McDonald v. Smith, 372 U. S. 479 (1985), which acknowledged that the right of a citizen to petition his government for redress of grievances is founded on the 5th Article of the English Bill of Rights of 1689. On this point, the petitioner agrees with emphasis.

The case holds that there is no absolute immunity protecting such a petitioner

as against suits at common law brought by third persons. On that point, English and American precedents are divided. Although he sees the need for further attention to the question in the future, the petitioner does not take issue with the holding of Justice Brennan, for it is consistent with the text of the 5th Article of the English Bill of Rights of 1689. Instead, the petitioner points to the second clause of the 5th Article, and says that there the absolute immunity against governmental prosecutions is expressed in a most emphatic and literal manner.

The petitioner concedes that certain suits at common law can be enjoined in equity, as held in Johnson's Restaurants v. N. L. R. B., 461 U. S. 479 (1983). Before the fictions in ejectment were abolished by the Statute of 3 & 4 William IV, Chapter 27 in 1833, the action could be brought again and again by the same freeholder without bar of res

judicata. The remedy against oppressive use of such procedure was a bill of peace before the chancellor. No one has ever thought this had anything whatever to do with the fundamental right of subjects to petition the King, because equitable defenses against suits at common law have traditionally been asserted by injunction, and to a lesser extent still may be so asserted in modern procedure.

The next case is Holt v. Virginia, 381 U. S. 131 (1965). There a lawyer made a motion for recusal of a judge. He was punished on contempt for the words of his motion, which was expressed in acceptable language and set forth grounds relevant to the relief sought, however unpleasant the messsage. The papers were filed by customary procedure. The judge cited him for contempt, but this court held that the lawyer was constitutionally immune from punishment. Such conforms exactly to the petitioner's view, and was required by the 5th Article of the

English Bill of Rights of 1689.

The last case is Blackledge v. Perry, 417 U. S. 22 (1972), where the principle here expounded was expanded to prohibit, not only prosecutions against the words of petition, but prosections alleging other wrongs while retaliatory or possibly retaliatory against such words. There the emphasis was upon establishing the connection between retaliation and prosecution, a problem which does not here exist.

In this case a lawyer has petitioned peaceably and politely, as prescribed in acts of Congress, and, for his words of remonstrance and nothing else, as in the Seven Bishops Case, he has been prosecuted in disciplinary proceedings, which are penal in nature, and, subject to certain immaterial exceptions, must be treated like criminal or contempt prosecutions in measuring basic privileges and immunities, including rights of due process. Disbarment was punishment

in England before the House of Lords and the Star Chamber, when sitting as tribunals of criminal jurisdiction. Disbarment, moreover, has been a criminal punishment since the Statute of 3 Edward I, Chapter 28 enacted in 1276, as explained on pages 26-29 of Volume 3 of the standard edition of Blackstone's Commentaries on the Laws of England. The leading authority in modern times on this point, of course, is Matter of Ruffalo, 390 U. S. 544 (1968). Indeed, this case is identical in all material respects to Holt v. Virginia in 381 U. S.

The punishment ordered against the petitioner should be reversed, without regard to any other considerations, merely because he enjoys an absolute immunity against such punishment under the First Amendment. If Spellacy, McNulty, Rathke, and Milligan wish to sue him at common law, the petitioner is fully prepared to defend against them. He insists, however, that he

is not obligated to defend against disciplinary proceedings which have been brought by the respondent as a public magistrate to punish his remonstrances to his government for help and redress.

2. The Speech and Press Clause in the First Amendment was obviously intended to incorporate the dissenting views of Justice Powell in the Seven Bishops Case. And this fact coincides with, supports, amplifies, and explains the holding of Justice Brennan in Garrison v. Louisiana, 379 U. S. 64 (1964), which is the most important progeny of New York Times v. Sullivan, 376 U. S. 254 (1964).

Laying aside the question of absolute privilege for the sake of discussion, the petitioner claims that he has a right under the Fourteenth Amendment to be adjudged on the disciplinary complaint against him according to the Sullivan/Garrison standard. In other words, he maintains that, even if

it wishes a stricter standard for regulation of the bar, a state supreme court cannot constitutionally punish a lawyer for criticizing the judiciary, outside the scope of petitioning his government for redress of grievances, as in a public speech or press conference, unless it is pleaded and proved that he spoke or wrote wrongfully as measured by the Sullivan/Garrison standard.

Lawyers are not second-class citizens, they need the Sullivan/Garrison immunity even more than other citizens, and disciplinary prosecutions are often used to chill freedom of speech and press. This broad contention has been well discussed by those commentators cited on pages A21-A22 of the Appendix hereof, and the petitioner has nothing to add at this juncture, for he is in general agreement with State Bar v. Semann, 508 S. W. 429 at 432-433 (Tex. Civ. App. 1974).

But there is in this case a much narrower contention on which the petitioner

wishes to place special emphasis. The charges against the petitioner, reproduced in Appendix D hereof, are founded on the operative language of MRPC Rule 8.2(a), specifically the phrase "reckless disregard for the truth."

MRPC Rule 8.2 is taken haec verba from ABARPC Rule 8.2 without any alterations or commentary by court or committee indicating a different intent. In the Chairman's Introduction to the ABA Model Rules, it states that the new regulations were adopted by the ABA House of Delegates on August 2, 1983, together with "ancillary materials," which included an appendix containing reporter notes. As to Rule 8.2, these reporter notes say,

> "The Supreme Court has held that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is 'false or with reckless disregard of whether it is false or not.' New York Times v. Sullivan, 376 U. S. 254 at 279-280 (1964). See Garrison v. Louisiana, 379 U. S. 64 (1964). Rule 8.2 is consistent with that limitation."

Therefore, it is as legally certain as anything can possibly be that the phrase "reckless disregard for the truth" in MRPC Rule 8.2(a) means exactly what Justice Brennan defined it to mean in Garrison v. Louisiana, 379 U. S. at 74-75, -- that is, "a high degree of awareness of probable falsity," as distinguished from "honest utterance." See also St. Amant v. Thompson, 390 U. S. 727 at 731 (1968), which gives the equivalent definition of "serious doubt of the truth," as well as Harte-Hank Communications v. Connaughton, 109 S. Ct. 2678 at 2696 (U. S. 1989), which repeats the earlier definitions, and speaks of the test as measuring a subjective frame of mind to be proved up by evidence of concrete facts.

Now, there is a fundamental precept of Due Process under the Fourteenth Amendment, which was well expounded in Bouie v. Columbia, 378 U. S. 347 at 352 (1964), and it is that punishment or liability to punishment for a

public wrong (necessarily including punishment in lawyer discipline prosecutions by virtue of the doctrine of Ruffalo in 390 U. S.), cannot be imposed where the positive law on which charges are based does not give adequate notice, -- and, moreover, failure of adequate notice can occur where the language of the statute or regulation is clear and precise as to its requirements, but punishment is imposed or liability to punishment is adjudged on an unforseeably broad judicial construction of such statute or regulation.

Given the phrasing, derivation, and history behind MRPC Rule 8.2(a), the petitioner and his counsel had every right to expect that the phrase "reckless disregard for the truth" would be interpreted according to the ABA standard, which is the Sullivan/Garrison standard. Perhaps the Minnesota Supreme Court might try to write up another rule, but given the ABA text and meaning

which they have adopted, and they cannot change the rule in the middle of a disciplinary prosecution so as to catch a dissident attorney, obviously detested by the justices, by a surprise interpretation.

In this case, the petitioner and his counsel read the accusation, the gist of which was "reckless disregard for the truth," and as lawyers, knowing the ABA background of the rules, they thought it would be enough to prove honesty and good faith. Because the referee was a brother judge of Spellacy and McNulty, and because of the emotional attitudes of the judicial establishment of Minnesota against the petitioner for his attempts to counteract corruption, or what he believed was corruption on the basis of his pleas in justification reproduced in Appendix F hereof, there was a high risk of antagonizing the court by moving too aggressively in proving the truth, other than by packing the record with all documents needed

to sustain the statements complained of, as was painstakingly done.

The main thrust was to prove honesty and good faith, and that was pushed hardest in the hearing. This strategy worked beautifully: the referee found that the petitioner was wrong, imprudent, and worse, but genuinely believed what he said, as appears in Appendix B hereof. That much was an acquittal under the Sullivan/Garrison standard as adopted by the American Bar Association and the Minnesota Supreme Court. The rest of the recriminations of the referee and the justices have no legal significance. For this reason, the disciplinary order against the petitioner should be reversed.

3. As appears in pages A3-A5 of the disciplinary order against the petitioner is founded on findings which he has not been allowed to contest, even though he was not served with those findings as literally required by MRLPR Rules 1(8) and 14(e), which

must be done, as said Rule 14(e) expressly states, before the time for ordering a transcript to contest the findings can begin to run. As a matter of Due Process under the Fourteenth Amendment, this cannot be sustained under the doctrines of Bouie in 378 U. S., and Ruffalo in 390 U. S.

In order to illustrate the great prejudice against him which has followed upon this error, the petitioner wishes to illustrate only (for he cannot here be exhaustive) how easy it will be for him to show, if he is given a chance, that critical findings against him are clearly erroneous.

As appears on A64-A69 of the Appendix hereof, the petitioner pleaded in his defense certain testimony of an independent lawyer (Alderman) in a sworn deposition taken of him on May 2, 1988, by the respondent as disciplinary prosecutor, and of record in Minnesota Supreme Court File No. C3-88-1760.

As appears on page A67 of the Appendix

hereof, Alderman explained what he was told on the evening of December 11, 1987, by an assistant county attorney under and law partner of Rathke, viz., that Milligan, Rathke's counsel, telephoned an intermediary who contacted McNulty, the judge in Duluth, and, consequently, the Shockman case "was taken care of, it was in the bag, the fix is on, something to that effect."

As appears on page A65 of the Appendix hereof, Alderman testified further as to what he was told by Rathke's assistant and partner, viz., that, because of Milligan's deeds, "he would not be surprised, if attorney's fees were imposed against Graham as a result of those proceedings."

And, as appears on page A69 of the Appendix hereof, Alderman testified still further as to what he was told by Rathke's assistant and partner, viz., that the intermediary "had some kind of clout or had some kind of influence with Judge McNulty in

Duluth, and would have been able to talk Judge McNulty into seeing things his way, or whatever."

Yet, as appears on pages A28 and A44 of the Appendix hereof, notwithstanding the shocking testimony just recited, the referee and justices of the Minnesota Supreme Court made the cavalier observations that the petitioner became unduly excited over a mere "snip" or "scrap of cocktail party conversation."

Again, as appears on pages A82-A83 of the Appendix hereof, the petitioner pleaded in his defense certain testimony appearing in sworn depositions taken by the respondent as disciplinary prosecutor, and of record in Minnesota Supreme Court File No. C3-88-1760, to wit: pages 40-41 of the deposition taken of Milligan on May 10, 1988; pages 30-31 and exhibit 4 of the deposition taken of Spellacy on June 16, 1988; and pages 8-10 of the deposition taken of Rathke on May 2, 1988. These show that, on December 10, 1987, with the

assistance of Spellacy's son, Milligan telephoned the chambers of Spellacy, -- that, on December 10, 1987, Rathke and Spellacy were registered in the same hotel, -- and that, on December 11, 1987, Rathke and Spellacy saw each other twice during the day.

Yet, as appears on page A16 of the Appendix hereof, the Minnesota Supreme Court said that "the accused parties could not have conspired as alleged because evidence showed no contact between the parties during the relevant period: December 9-11, 1987."

Therefore, because of denial of Due Process under the Fourteenth Amendment, even if we lay aside claims of absolute privilege, and of qualified privilege based on honesty and good faith, there must be a reversal of the order imposing discipline here sought to be reviewed on writ of certiorari.

4. As appears on pages A33-A34 of the Appendix hereof, the Minnesota Supreme Court has punished the petitioner for "fri-

volous claims and defenses" and "conduct prejudicial to the administration of justice." As appears in the pleading reproduced on pages A47-A49 of the Appendix hereof, the petitioner was accused of "reckless disregard for the truth," but neither "frivolous claims and defenses," nor "conduct prejudicial to the administration of justice." The punishment for anything other than "reckless disregard for the truth" must obviously be set aside as a violation of Due Process under the Fourteenth Amendment, as in Ruffalo, 390 U. S., which was identical in principle to this case, except that it turned on Due Process under the Fifth Amendment.

5. As appears on pages A33-A34 and A36-A37 of the Appendix hereof, the Minnesota Supreme Court has ordered discipline against the petitioner for sending certain letters, filing certain petitions, and making certain motions. The petitioner firmly denies any wrongdoing, and stands ready to establish

his innocence if he is ever accused. He notes that these letters, complaints, and motions are not mentioned in the accusation reproduced in pages A47-A49 of the Appendix hereof. Punishment for these letters, petitions, and motions under these circumstances is a violation of Due Process under the Fourteenth Amendment, because it runs against the doctrine of Ruffalo in 390 U. S.

CONCLUSION

Your petitioner deeply regrets that he must represent himself at this stage, but he has been forced by the circumstances of these proceedings to close his practice, sell his home, leave his circle of friends, flee from the United States, and take up residence with his family in Canada, under the protection of her Majesty's excellent government, for which he is grateful. The resources of your petitioner have been heavily depleted, and must be carefully spared, for he and his wife, a member of the Quebec Bar, have

children to care for.

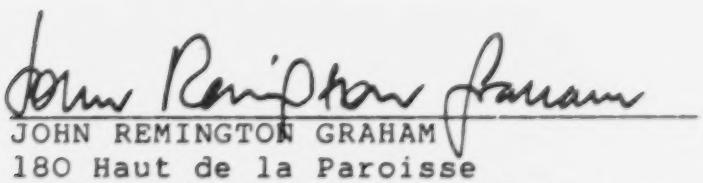
In this respect, this case is not unlike the case of John Wilkes who was forced to flee England for France, or the case of Emil Zola who was forced to flee from France for England, in both instances because they also were obliged in conscience to criticize public officers of their governments. Yet this case is different in that your petitioner did not, like Wilkes and Zola, publish anything abroad, but merely sought the assistance of his government, in two instances by filing petitions confidentially as prescribed by acts of Congress. In the third instance, he filed nothing, for the papers were filed by his counsel, again according to an act of Congress, in support of a motion in federal court, and this motion was granted, whereupon he prevailed on the merits.

Your petitioner will continue his efforts to obtain counsel. If a writ of

certiorari is granted, as your petitioner earnestly prays, he will be happy to receive any recommendations of this court that he may be represented by counsel on the merits.

Please, your Honors, my life and career are now in your hands. I do with crying heart beg of you, for this is virtually my last chance for legal redress against this injustice. Give me a writ that I may show you my innocence!

Respecfully submitted



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APPENDIX A

PER CURIAM OPINION AND ORDER OF THE MINNESOTA SUPREME COURT, IN MATTER OF GRAHAM, FILE NO. C3-88-1760, ENTERED ON MARCH 23, 1990, OF WHICH REVIEW IS SOUGHT ON WRIT OF CERTIORARI

This matter comes before us on petition from the Director of the Lawyers Professional Responsibility Board for disciplinary action against John Remington Graham, respondent. The Director charged Graham with violating Rules 3.1, 8.2(a), 8.4(d), Minnesota Rule of Professional Conduct, by making false statements regarding the integrity of a judge, a magistrate, a legal officer, and lawyer without basis in fact and with reckless disregard for the truth or falsity of the statements.

The statements accused Minnesota District Court Judge John Spellacy, United States Magistrate Patrick J. McNulty, Crow Wing Attorney Stephen Rathke, and Rathke's attorney, Michael Milligan, and others of a conspiracy fixing the outcome in the federal

court case of Shockman v. Rathke, No. CV-5-87-260 (D. Minn. 1988). The statements appeared in an unsworn letter to United States Attorney Jerome Arnold, in a sworn complaint to Chief Judge Lay of the Eighth Circuit Court of Appeals alleging judicial misconduct against Judge McNulty, and in an affidavit in support of a motion to recuse Judge McNulty from considering whether attorney fees should be awarded against Graham in the Shockman v. Rathke case.

A hearing on the Director's petition was held in Little Falls, Minnesota, on December 13-15, 1988, before Hon. Paul Hoffman acting as referee. He made his findings of fact and conclusions of law on February 21, 1989. Graham's counsel received the referee report on February 24, 1989, and immediately contacted Graham in Quebec, Canada, to discuss it. Based on discussion of the referee's report with his counsel, Graham decided to settle. Settlement negotiations broke down,

however. Graham now disputes the referee's factual findings and conclusion, and has moved for permission to order a transcript.

I. Motions

A. Motion for permission to order a transcript.

Review of this disciplinary action is limited by Rule 14(e), Rules on Lawyer's Professional Responsibility (RLPR, 1989 Supp.), which provides in part:

> The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director of them. Unless the respondent or Director, within ten days, orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive.

Graham argues that Rule 14(e) requires service of the findings and conclusions directly on him as respondent, even though he was represented by counsel. Rule 14(e) does state that the respondent is to be notified. Rule 1, RLPR defines "notify" as meaning "to give personal notice or to mail to the per-

son at his last known address or the address maintained on this Court's attorney registration records." No express provision of the RLPR states the the respondent must be personally served with notice, however. RLPR 14(b) does state that the referee that the referee hearing "shall be conducted in accordance with the rules of civil procedure applicable to district courts." Minnesota civil procedure rules require service of represented parties to be on the attorney. Minn. R. Civ. Proc. 5.02 and Minn. R. Civ. App. 125.03. Because notification of the findings and conclusions of the referee flow from the hearing proceeding itself, we hold that the civil procedure rules also apply to Rule 14(e). Thus, notification to Graham's attorney constituted notification to respondent Graham under Rule 14(e) and definitional Rule 1.

Graham's attorney did receive notice of the findings and conclusions on February

24, 1988, and immediately contacted Graham by telephone to discuss them. Graham thereby also had actual notice. He decided to settle based on that information. In fact, he was willing to rely on that information to such an extent that he returned a signed version of the stipulation without ever having received a copy of the referee's report and even though he thought the report was "far from the truth." Director's Response to Motion at 2. In short, from both a technical and equitable point of view, Graham received notice as required by Rule 14(e). As he did not order a transcrip within the requisite period, the findings of act and conclusions made by the referee are conclusive.[1] See Application of Hetland, 275 N. W. 2d 582, 583 n. 5 (Minn. 1978)

B. Motions for removal of Director Wernz and his assistant from this case.

In addition to his motion for permission to order a transcript, Graham moved

for the removal of Director Wernz and his assistant from this matter and for the removal Director Wernz from office.

The issue of whether Wernz should be removed from Graham's disciplinary hearing was considered at the disciplinary hearing itself. Finding 50 found no grounds for removal. We have reviewed the record and concur. Moreover, under the review standard of Rule 14(e), that finding is conclusive. Conseuquently, we deny his motion.

The motion to remove Wernz' senior assistant is summarily denied. Graham himself states in his motion, "I do not believe [Wernz's] assistant has done anything questionable . . . ." That being the case, no reason appears to remove her.

C. Motion to remove Director Wernz from office.

Graham also filed a petition with this court from removal of Wernz from office. We find no merit this motion, and therefore

deny it.

II. Referee's Factual Findings

Having disposed of Graham's motions, we turn to the substance of this disciplinary hearing. The referee's factual findings are comprehensive, and may be summarized as follows:

Graham has been a licensed Minnesota attorney since 1967. He practiced in Brainerd, Minnesota from 1981 until August 1988, when he moved to Quebec, Canada. While practicing in Brainerd, substantial personal and political ill-will arose between Stephen Rathke, Crow Wing County Attorney, and him. The animosity continued throughout the period covered by this matter.

Graham's statements against Rathke, Spellacy, McNulty, and Milligan, which led to this suit for disciplinary action, followed the Shockman v. Rathke decision that denied issuance of an injunction against prosecution of Michael Shockman. The back-

ground of that case forms the basis for Graham's accusations and this disciplinary matter.

On September 21, 1987, Michael Shockman struck his seven-year-old son on the face causing facial bruises. The son's school reported the bruises. Brainerd city police removed the boy from school and place him in prctective custody on September 25, 1987. The Shockmans retained Graham on september 26, 1987, to help them regain their son. The son was returned to the family on September 28, 1987.

On October 1, 1987, subsequent to the child's return, Graham wrote to a member of the Crow Wing County Board complaining about the handling of several custody and child protection cases, including that of the Shockmans. He did not refer to the Shockmans by name. He criticized Rathke in particular, but not in connection with handling the Shockman case. The letter caused heated

debate at the county board meeting held on October 6, 1987.

On October 9, 1987, an assistant Crow Wing County attorney, with the agreement of Rathke, signed a fifth degree assault charge against Shockman for striking his son. Graham, as Shockman's attorney, filed a federal court complaint on October 21, 1987 seeking to enjoin the assault prosecution on the grounds that Rathke had commenced it in retaliation for Graham's letter.

In response, Rathke requested district court judge John Spellacy to convene a grand jury to consider whether to indict Michael Shockman for assault and to inquire into the process which gave rise to the criminal complaint against Shockman. A grand jury was convened in the Shockman matter, and a special prosecutor unconnected with Rathke was appointed. The grand jury returned an indictment against Michael Shockman. During this period, Judge

Spellacy had remarked to Graham that Graham's comments in his October 1, 1987 letter might constitute criminal defamation. No charge or indictment as to possible defamation by Graham, but Graham took Spellacy's comment to mean the grand jury had really been convened to induct him for criminal defamation.

On December 9, 1987, Rathke, Rathke's attorney Michael Milligan, and Graham met with Magistrate Patrick J. McNulty in Duluth on Graham's motion for a temporary injunction in the Shockman case. They decided to hold an expedited trial in January on the suit for permanent injunction. The referee found that the proceedings and results of this December 9 hearing did not support Graham's later assertion that at that hearing

> [t]he judge had indicated preliminary approval of the suit. The evidence seemed reasonable. The law . . . seemed reasonable . . . . [McNulty] clearly enough hinted he was going to give my clients . . . relief pendente lite.

In re Graham, No. C3-88-1760, Finding of Fact 20

(hereinafter "Order"). Graham filed an amended complaint following the December 9 hearing. Milligan answered on Rathke's behalf alleging violations of Rule 11 of Minnesota Rules of Civil Procedure and Minnesota Statutes Section 549.21 (1988) and asserted rights to attorney's fees, costs, and disbursements.

The expedited trial seeking an injunction was held January 4-6, 1988. McNulty found for defendant Rathke. Milligan moved for award of attorney fees. His argument in support of the motion described Graham as the real party in interest who brought the suit only in order to harass and embarrass Rathke. The referee found Milligan's written argument reasonably made and not "a bizarre procedural irregularity" as Graham claimed it to be.

In late January, Graham heard via a third party about a conversation that occurred during a local bar association Christmas

party held on December 11, 1987. According to what Graham heard, Bruce Alderman, who attended the party, understood someone to say that Milligan had telephoned someone else who in turn contacted the judge in Duluth about the upcoming Shockman case and that "everything had been taken care of" or the result was "in the bag." Graham suspected a conspiracy and contacted Alderman to discuss the conversation. During the meeting, Graham tried to get him to say that Spellacy was the middleman in the "conspiracy," but on the contrary he never indicated that Spellacy was or would have been the middleman, nor did he say that Rathke's name had been mentioned in connection with the "conspiracy."

Based on (1) his interview with Alderman, (2) his belief that Milligan engaged in bizarre procedural irregularities, and (3) that McNulty showed an abrupt change in attitude from the December 9 hearing and

the trial Graham made the accusations that basis of this disciplinary action. Sworn accusations were made on the basis of Graham made the accusations that are the basis of this disciplinary action. Sworn accusations were made on the basis of Graham's "certain knowledge" that the case was fixed at some time during December 9-11, 1987, at least three weeks before trial, by means of improper influence consisting of "political connections and illicit persuasion."

In a letter to Jerome Arnold, United States Attorney, Milligan had contacted Judge who contacted Magistrate McNulty's commitment to decide the upcoming case of Shockman v. Rathke without regard to the law and the facts.[2] Noting that Graham later acknowledged that Rathke may not have requested the case be fixed, but only acquiesed in a fix arranged by others, the referee found [t]here was no reasonable basis for these allegations in respondent's log or else-

where." Order, finding 38.

In a complaint for judicial misconduct,[3] Graham alleged "of his certain knowledge"

> that Judge Spellacy "using his long established political connections and friendship as the modus operandi" obtained Magistrate McNulty's commitment to decide against the Shockmans. [Graham] further alleged . . . [that] "it was in fact known to Mr. Rathke, Mr. Milligan, Judge McNulty, and others how the case would be decided some three weeks before the opening of the trial on January 4, 1988, all as a consequence of corrupt influence. . . ."

Order, finding 44. The referee found these accusations to be false, both as statements and in the sense that they were made as absolutes when in fact Graham admitted at the disciplinary hearing that

> by "political" he meant "old boy influence peddling" not just organized political party connection . . . [and] that by "certain knowledge," he meant several things, including "belief" and "great probability."

Order, finding 45. The referee noted that Graham

> is a learned and intelligent attorney,

> capable of using words according to their normal meanings. In these and other instances he either chose not to do so or, when confronted by evidence, to try to explain away his specific claims. -- Id.

Graham also made similar accusations in his sworn affidavit in support of the motion to recuse Magistrate McNulty from considering the award of attorney fees in the Shockman case. The referee also found these statements to be false.

The referee in this disciplinary matter found that nothing in the Shockman v. Rathke trial transcript supported Graham's allegations that Milligan knew what was going to happen at trial before it happened; nor did it support Graham's allegations that Judge McNulty was exceedingly biased, displayed an abrupt change of attitude from the December 9 meeting, and had his mind made up before he walked into the courtroom. Moreover, the refereee found that Milligan's post-trial written argument in support of awarding attorney's fees was reasonable and

not a "bizarre procedural irregularity."

Additionally, Graham stated under oath in both the complaint to the eighth circuit and in his affidavit that "of his certain knowledge" the acts of fixing the Shockman case were done "with the knowledge and consent of others," yet at the hearing before the referee, Graham testified that he had no knowledge any "others" involved. Again, the referee found his allegations "others" false.[4]

Voluminous telephone records and testimony as to the whereabouts of the various people accused of the conspiracy during the relevant period belie Graham's conclusions. Thus, the referee also found that the accused parties could not have conspired as alleged because evidence showed no contact between the parties occurred during the relevant period: December 9-11, 1988.

In sum, the referee found that Graham had no reasonable basis for his assertions

of a conspiracy in the Shockman v. Rathke case and that his allegations were false, frivolous, and made in reckless disregard of their truth or falsity.

III. Referee's conclusions of law

Based on his findings, the referee concluded that Graham's statements regarding the integrity of Judge Spellacy and Crow Wing County Attorney Rathke were made without basis in fact and with reckless disregard for the statements' truth or falsity, in violation of Rules 3.1, 8.2(a), and 8.4(d), Minnesota Rules of Professional Conduct; those regarding Magistrate McNulty were false and made without basis other than the report of Alderman and in reckless disregard of their truth or falsity, in violation of Rules 3.1, 8.2(a), and 8.4(d); and those made against Milligan were false, without basis other than Alderman's report and in reckless disregard as to their truth or falsity, in violation of Rules 3.1 and

8.4(d). Pursuant to Rule 14(e), those findings and conclusions are conclusive upon review of the disciplinary action.

IV. Absolute immunity

Graham argues that regardless of the findings, he cannot be disciplined because the statements were petitions for redress of grievances, and what he said in them is absolutely privileged under the first amendment. Thus he enjoys absolute immunity from any and all forms of criminal or civil prosecution.

Graham misconceives the privilege. The petition clause does not provide an absolute privilege against all forms of prosecution. See, e. g., McDonald v. Smith, 472 U. S. 479, 484 (1985) (holding petition clause does not provide absolute privilege petitions to the President containing intentional and reckless falsehoods do not receive constitutional protection and may be reached by libel law); Bill Johnson's Res-

taurants, Inc. v. N. L. R. B., 461 U. S. 731, 743 (1983) (First amendment right to petition does not immunize against baseless litigation).

The question of absolute privilege comes before this court, not within the context of a criminal or civil prosecution, but rather within the context of an attorney disciplinary action. As this court stated in In re Daly, 291 Minn. 488, 490, 189 N. W. 2d 176, 178 (1971):

> Although disciplinary proceedings have been described in the context of the requirement of criminal due process as "adversary proceedings of a quasi-criminal nature (In re Ruffalo, 390 U. S. 544, 551) . . . they are not considered in the same light as an ordinary action but are proceedings sui generis: "A disciplinary proceeding is not the trial of an action or suit between adverse parties, but an investigation or inquiry by the court into the conduct of one of its officers in order to determine his fitness to continue as a member of his profession" In re Application for Discipline of Peterson, 260 Minn. 339, 334, 110 N. W. 2d 9, 13 (1961).

Disciplinary proceedings are designed to

> discharge this court's responsibility to protect the public, the administration of justice, and the profession by imposing disciplinary sanctions, including removal from practice, upon those attorneys who, after careful investigation, proper notice, and hearing, are found to have demonstrated that they do not possess the "qualities of character and the professional competence requisite to the practice of law"

Id. at 489, 189 N. W. 2d 178 [quoting Baird v. State Bar of Arizona, 401 U. S. 1, 7 (1971), other citations omitted]. The are not designed "to prevent [an attorney] from, in good faith, espousing a legal cause, however unpopular or seemingly untenable." Id. In short, disciplinary actions require a different legal approach.

Thus, the issue becomes to what extent constitutional first amendment rights have application in disciplinary proceedings when an attorney brings serious charges against judges and legal officials impugning their integrity.

In the interest of free speech, a limited immunity protects from civil or

criminal defamation those who would criticize public officials for their official conduct. New York Times v. Sullivan, 376 U. S. 254, 279-280 (1964); Garrison v. Louisiana, 279 U. S. 64, 74 (1964). Even though critical statements of fact regarding the official are false, the public official cannot recover unless the statements were made with "actual malice," which is defined as knowledge that the statements were false or made with reckless disregard of their truth or falsity. New York Times, 376 U. S. at 279-280.

Neither Minnesota courts nor the United States Supreme Court have expressly extended the constitutional qualified immunity beyond the area of civil and criminal proceedings to attorney discipline ones. various commentators have advocated such an extension, however. See Comment, The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware,

15 N. Ky. L. Rev. 129 (1988); see also Note, Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment, 56 Notre Dame L. Rev. 489, 504-505 (1981). Cf. Rieger, Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?, 2 Const. Com. 69 (1985); G. Hazard & W. Hodes, The Law of Lawyering 552-554 (1985). A few jurisdictions in dicta have indicated that the constitutional actual malice standard applies to attorney discipline proceedings. See, e. g., Eisenberg v. Boardman, 302 F. Supp. 1360, 1362 (W. D. 1969) (noting that whether derogatory statements made by attorneys about judges are protected by New York Times actual malice standard from imposition of attorney discipline "has not been made clear," but assuming some speech considered disrespectful to judiciary would be so protected); State Bar v. Semaan, 508 S. W. 2d 429, 432-433 (Tex. Civ. App. 1974) (noting that whether derogatory statements about

public officials, including judges, are constitutionally protected from imposition of attorney disciplinary sanctions "has not been authoritatively determined."

Constitutional first amendment rights have long protected Minnesota attorneys from disciplinary action when those rights were exercised either to criticize rulings of the court once litigation was complete or to criticize judicial conduct or even integrity. See State Board of Law Examiners v. Hart, 104 Minn. 88, 114-120, 116 N. W. 212, 214-117 (1908). Yet, the protection granted has not been absolute. When an attorney abuses that right, he/she is subject to discipline. See, e. g., In re Williams, 414 N. W. 2d 394, 496 (Minn. 1987) (rejecting that attorney's actions were merely exercice of free speech, court distinguished between conduct of ordinary citizen and that of attorney in court and disciplined attorney for falsely attacking moral

moral character of witness).[5]

This court, however, has not previously determined whether the constitutional qualified immunity standard of New York Times applies when determining whether Rule 8.2(a) has been violated. The language of Rule 8.2(a), MRPC, impliedly incorporates the standard. It provides:

> 8.2 Judicial and legal officials: (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer . . . .

On its face, Rule 8.2(a) rejects an absolute privilege for false statements made by attorneys with reckless disregard for their falsity. It is identical to Rule 8.2, American Bar Association Model Rules of Professional Conduct ("ABARPC"). Commentators have noted that Rule 8.2 ABARPC is consistent with the constitutional limits placed on defamation actions by the United States Supreme Court cases of New York Times

and Garrison. See, e. g., Hazard & Holes, supra, at 552-554.

Nevertheless, the standard cannot be equivalent to that of New York Times and its progeny, because the standard for determining actual malice must be objective when dealing with attorney discipline.[6] We reach this conclusion because of the interests attorney discipline serves.

The court certifies attorneys for practice to protect the public and the administration of justice. That certification implies that the individual admitted to practice law exhibits a sound capacity for judgment. Where an attorney criticizes the bench and bar, the issue is not simply whether the criticized individual has been harmed, but rather whether the criticism impugning the integrity of judge or legal officer adversely affects the administration of justice and adversely reflects on the accuser's capacity for sound judgment.

An attorney who makes critical statements regarding judges and legal officers with reckless disregard for their truth or falsity and who brings frivolous actions against members of the bench and bar exhibits a lack of judgment that conflicts with his or her position as an "officer of the legal system and a public citizen having special responsibility for the quality of justice." Minn. R. Prof. Conduct, Preamble.

We agree with the distinction made by Supreme Court of Indiana when it stated,

> The societal interests protected by [defamation and professional disciplinary] are not identical. Defamation is a wrong directed against an individual and the remedy is a personal redress of this wrong. On the other hand, the Code of Professional Responsibility encompasses a much broader spectrum of protection. Professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations."

In re Terry, 271 Ind. 499, 502, 394 N. E. 2d 94, 95, cert. den. sub nom Terry v. Indiana Supreme

Court Disc. Com., 444 U. S. 1077 (1980).

Because of the interest in protecting the public, the administration of justice and the profession, a purely subjective standard is inappropriate. The standard applied must reflect that level of competence, of sense of responsibility to the legal system, of understanding of legal rights and of legal procedures to be used only for legitimate purposes and not to harass or intimidate others, that is essential to the character of an attorney practicing in Minnesota. Thus, we hold that the standard must be an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.

V. Knowledge of falsity or reckless disregard

The question before us, then, becomes whether Graham's statements were made with reckless disregard as to their truth or falsity. Both the findings and legal conclu-

sions of the referee stated that Graham did in fact act with reckless disregard as to the truth or falsity of the statements made regarding Spellacy, McNulty, Rathke, and Milligan. Pursuant to Rule 14(e), those findings and conclusions are considered conclusive for purposes of this review.

Graham argues, however, that because the referee noted in his Memorandum accompanying his findings of fact and conclusions of law that Graham's "feelings are genuine," he cannot find that Graham acted in knowledge of or in reckless disregard is a subjective one. As we hold today that the standard is objective, the fact that Graham's feelings were "genuine" is insufficient to negate the referee's findings and conclusions that Graham acted with reckless disregard as to the truth or falsity of his statements.[7]

Graham's charges were prompted by and dependent upon a third party's report of a snip of cocktail conversation. The

report gave, at the most, only the name of Milligan as having to someone with clout who in turn contacted a Duluth judge. Graham, without any corroberative evidence, but based on his own suspicions, decided that the middleman had to be Spellacy. Although Graham attempted to lead Alderman in agreeing that the name must have been Spellacy, Alderman insisted he did not know. Also based on his own suspicions, Graham decided Rathke must have asked Milligan to instigate the conspiracy. No one had said Rathke's name had been mentioned. Thus, with only his own suspicions as a guide, he accused Rathke and Spellacy of conspiracy along with McNulty and Milligan.

In the letter to Arnold, Graham stated that the conspiracy occurred "with the knowledge and consent, and at the request of Mr. Rathke." In his judicial complaint to Judge Lay and in his affidavit, he made similar accusations of his "certain knowledge." Yet

at the disciplinary hearing, he retracted his accusation and acknowledged that Rathke might only have acquiesced in the "fix."

As proof of Judge Spellacy's part in the conspiracy, Graham cited to a letter from Milligan to Spellacy, "acknowledging contact and communication between them relative to the pending case of Shockman v. Rathke." A series of three letters between the parties shows no evidence of conspiracy. The letters relate to Milligan's desire to use Spellacy as a witness in the Shockman v. Rathke case to prove that Rathke had no control over the indictment process. As Spellacy had called the grand jury which indicted Shockman, his testimony was necessary and reasonable. Further, Spellacy's letter to Milligan refutes any impression of conspiracy. He states, "I cannot and will not talk to either attorney about what my testimony would be prior to actually testifying." Additionally, the initial letter

from Milligan to Spellacy states that Milligan had tried to contact Spellacy by telephone on December 10, 1987, but had been unable to reach him. From the testimony that the various parties to the alleged conspiracy were not in the same geographical location during the relevant time, it is evident that the conspiracy must have occurred via telephone. Yet, Milligan's letter dispels that possibility. To read those letters and conclude that Spellacy was a middleman in a conspiracy shows a reckless disregard for the truth.

Another mainstay of Graham's "proof" of a conspiracy is what he terms the abrupt change of attitude of McNulty between the temporary injunction hearing on December 9, 1988, and the expedited trial on January 4-6, 1989. The referee found nothing in the Shockman v. Rathke trial transcript to support Graham's allegations regarding McNulty's extreme bias or abrupt change of attitude.

Graham made accusations as absolutes, yet attempted to soften them when questioned at the disciplinary hearing. No longer did the conspiracy of his "certain knowledge," but rather only on the basis of his belief. No longer was the conspiracy instigated by Rathke, but Rathke may have only acquiesced in it. No longer was the modus operandi political influence, but rather old boy peddling.

He put forth as evidence letters that could only be read as proving the opposite. He stated as fact that Spellacy was the middleman, when in fact the one source that said the case had been fixed, refused to name Spellacy as the person who could have been that person.

Impugning the intergrity of judges and public legal officers by stating as certainties that which was based on nonexistent evidence or mere supposition is conduct that reflects a reckless disregard for the truth

of falsity of the statements made, in violation of Rule 8.2(a).

VI. Frivolous claims and prejudice to the administration of justice

Graham is also charged with violating disciplinary rules 3.1 and 8.4(d). These rules provide as follows:

> 3.1 Meritorous Claims and Contentions: A lawyer shall not bring . . . or assert . . . an issue [in a proceeding], unless there is a good basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.
>
> 8.4 Misconduct: It is professionam mis conduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice . . . .

Under the review standard of Rule 14(e) and in light of the discussion above, we hold that Graham also violated these provisions. It is worthy of note that two other disciplinary proceedings have found the same allegations groundless and frivolous. Order, Judicial Council of the Eighth Circuit, JCP No. 88-001 (May 20, 1988); Determina-

tion that Discipline is not Warranted, Wernz, July 5, 1988.

VII. The Sanction

The question of appropriate discipline remains. Other jurisdictions support imposition of discipline when attorneys have made reckless allegations of improper conduct. See In re Belue, 766 P. 2d 206, 207-208 (Mont. 1988) (attorney suspended for three months for, among other things, filing during a proceeding a frivolous motion for disciplinary action against opposing counsel accusing them of bribing the presiding judge); Louisiana State Bar Ass'n. v. Karst, 428 So. 2d 406, 409-410 (La. 1983) (attorney suspended for alleging judicial corruption when factual basis consisted only of his "logical inferences"; subjective belief in correctness of allegations does not excuse violation); In re Terry, 271 Ind. at 501-502, 394 N. E. 2d at 95-96 (attorney disbarred for alleging without any basis that

judge conspired to protect a criminal; court distinguished constitutional protection accorded in defamation actions from disciplinary proceedings and did not adopt same standard); In re Frerichs, 238 N. W. 2d 754, 765, 770 (Iowa 1976) (attorney admonished for accusing Iowa Supreme Court of what amounted to fraud and deceit in its review of factual record).

The referee recommended that Graham be suspended from the practice of law for 60 days; that the reinstatement hearing required by the Rules on Lawyers Professional Responsibility 18(a) through (d) be waived; that he successfully complete the professional responsibility portion of the state bar examination within one year of his suspension, and that he pay $1000 in costs plus disbursments, pursuant to R.L.P.R. 24(a) and (b), respectively. In deciding what discipline to impose, we accord great weight to the referee's recommendation, but

the decision as to what discipline to impose is ours. In re Ylitalo, 420 N. W. 2d 615, 616 (Minn. 1988).

Although the purpose of disciplinary proceedings is not to punish the attorney, sanctions are imposed to deter the improper conduct in the future. Where an attorney makes statements "of his certain knowledge," with reckless disregard as to the statements' truth or falsity, impugning the integrity of those who work within the judicial system, at the very least a public reprimand is in order.

In Graham's case, however, aggravating factors exist. Graham compounded the initial violations with which he is charged by writing to the Directorexpanding his allegations against Judge Spellacy to include perjury, deliberate falsehoods and criminal abuse of power. (Dir. Ex. 26A, 26B, 26D, 26H). Additionally, Graham lodged a frivolous petition to remove Wernz from office. By repeatedly entering frivolous motions to

remove those who oppose him, Graham continues to violate Rule 3.1, Minn. R. Prof. Conduct.

Graham's attitude is similar to that of respondent attorney in In re Williams. This court noted there that Williams chose to believe in a conspiracy against him and preferred to find fault with others than himself. Williams was suspended for 6 months for engaging in trial tactics designed "to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record." In re Williams, 414 N. W. 2d at 397, 399.

In view of Graham's attitude, we believe a public reprimand insufficient and adopt instead the referee's recommendation of 60 days suspension and succesful completion of the professional responsibility test.

It is, therefore, ordered:

(1) Respondent John Remington Graham is suspended from the practice of law for 60

days, which period begins from the date of this opinion;

(2) Respondent must succesfully complete the professional responsibility portion of the state bar examination within one year of the date of this opinion;

(3) Respondent shall pay $750 in costs;

(4) The reinstatement hearing required by the Rules on Lawyers Professional Responsibility ("R.L.P.R.") 18(a) through (d) shall be waived.

FOOTNOTES

1 - Finding 49 is an exception. Finding 49 found statements Graham made in letters to the Director regarding Judge Spellacy false. Those allegations were not the subject of formal charges against Graham. As a matter of due process, Graham cannot be found to violated disciplinary rules by certain actions which were not the subject of formal charges. See In re Ruffalo, 390 U. S. 544, reh'g denied, 391 U. S. 961 (1968), as applied in Disciplinary Proceedings of Phelps, 637 F. 2d 171, 174 (10 Cir. 1981). As a result, finding 49 cannot be part of the conclusion of law finding a violation on that ground.

2 - The FBI investigated the conspiracy charges in response to Graham's complaint to U. S. Attorney Arnold. The investigation included interviews of the alleged parties involved. Alderman verified the essence of the conversation, namely that the Shockman case was "in the bag," but stated that he did not remember any specific names mentioned, though names had been mentioned. Steinbauer admitted discussing the upcoming Shockman v. Rathke case with Alderman, but stated that he has said the Shockman case would be decided in favor of the County and Rathke based on his understanding of the law and what had happened.

3 - Because Graham had "made public charges and they have appeared in newspaper stories in the State of Minnesota," Order in JCP No. 88-001 at 1 n. 1, Magistrate McNulty waived confidentiality as to the record and filings. The record shows that Chief Judge Lay considered the complaint against McNulty to be broader than mere dissatisfaction with the result of the Shockman v. Rathke case, al-

though it emanated from it. Therefore, he had to determine whether the complaint was frivolous in its content. Judge Lay noted that Graham stated in his affidavit as his mainstays of proof: "(1) the abrupt change of attitude by Judge McNulty [that is, Graham charges that Magistrate McNulty was very cordial during the pretrial confedence, but became hostile during the trial], (2) the bizarre procedural irregularities indulged in by Mr. Milligan and allowed by Judge McNulty, and (3) the confession of a co-conspirator, viz., Mr. Steinbauer, all corroberated by circumstantial evidence of the corpus delicti. The evidence is enough, in my opinion, to secure indictments under 18 U. S. C., Sections 241 and/or 242, or 371 and/or 1503. See, e. g., Pettibone v. United States, 148 U. S. 197 at 202-203 (1893)." Order, May 20, 1988, re JCP No. 88-001 at 8-9, 9 n. 4. The Chief Judge said that [t]he alleged irregularities of Milligan relate to arguments he made before Magistrate McNulty which in effect stated that the real party in interest in the federal proceeding was actually Graham, based on personal dislike for Rathke, the Crow Wing County Attorney." Id. at 9 After examining the evidence presented by Graham and the FBI interviews, Chief Judge Lay concluded, "I find there is no evidence whatsoever that even suggests Magistrate McNulty engaged in judicial misconduct. Magistrate McNulty's ruling in favor of the defendant and against Graham's client does not in any way imply misconduct. Not only is a prayer for federal injunctive relief against a state criminal proceeding rarely granted, but Magistrate McNulty's thorough and objective opinion and legal analysis belie Graham's conclusory statement that the case was predetermined . . . Graham even concedes that he is engaging in speculation based

both upon Judge Spellacy's supposed "friendship" with Magistrate Mc Nulty and the speculation that Judge Spellacy owed Attorney Milligan (Rathke's counsel) a favor. No rational fact finder could draw such a conclusion. The major and minor premises to Graham's supposed syllogistic reasoning are: (1) Spellacy is a judge, and (2) he has a friendship with Mc Nulty. However, to therefore conclude they entered into a criminal conspiracy is absurd. . . . Graham alone . . . . supplied the names of all the participants based upon his own speculation." Order, May 20, 1988, re JCP No. 88-001 at 11-12.

4 - Graham also lodged a complaint with the Lawyers Professional Responsibility Board against the same parties he accused of conspiring to fix the Shockman case. On the basis of testimonial evidence taken from all the parties involved, the Office of Professional Responsibility with respect to Graham's complaint against the other parties of violation of the rules of profesional responsibility that "these events might easily have led to inquiry; they should not have led to accusation of allegation that in fact a conspiracy took place." Memorandum to Determination that Discipline is not Warranted, July 5, 1988, at 7.

5 - In In re Williams, this court found that when an attorney is in the courtroom, as an officer of the court engaged in court business, "appropriate rules of evidence, decorum, and professional conduct [governing his/her speech] do not offend the first amendment." Id. at 397 (citing In re Getty, 401 N. W. 2d 668 (Minn. 1987)). Trial tactics calculated to demean the witness and to convert relevant questions into a false personal attack on the witness violated Rule 8.4

(d) (conduct prejudicial to the administration of justice). Id. at 395-397. Additionally, this court noted that the Supreme Court, in In re Snyder, 472 U. S. 634, 644-645 (1985), stated that, "The licence granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." Williams, 414 N. W. 2d at 397. The Supreme Court in In re Snyder, however, did not reach the constitutional first amendment issue, but rather decided the case on the basis of possible violation of the professional rules.

6 - That is in contrast to the subjective standard applied to determine actual malice. See Harte-Hanks Communications, Inc. v. Connaughton, -- U. S. --, 109 S. Ct. 2678, 2696 (1989). In Harte-Hanks, the Court explained the constitutional standard for determining actual malice as follows: "A reckless disregard for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. St-Amant, 390 U. S. at 731. There must be sufficient evidence to permit the conclusion that defendant actually had a high degree of awareness of probable falsity. Garrison v. Louisiana, 379 U. S. at 74. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard . . . In a case . . . reporting a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. St. Amant, 390 U. S. at 732." Harte-Hanks, -- U. S. --, 109 S. Ct. at 2696.

7 - Even under Harte-Hanks, it is doubtful that Graham's "genuine feelings" would have been enough. To determine whether the standard has been met, the Supreme Court noted that "the reviewing court must consider the factual record in full . . . and examine for itself the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect . . . . " Harte-Hanks, -- U. S. --, 109 S. Ct. at 2696 (citations omitted). Although the Court in Harte-Hanks states that the standard is subjective, the manner in which the Court examined the entire record of evidence before it concluded that actual malice existed evidences a standard that requires more than a subjective statement that one's "feelings were genuine." The case was brought by an unseccessful candidate for public office who claimed that a newspaper article which quoted someone who accused him of using "dirty tricks" defamed him. Id. at 2681-2682. The charges were accurately reported as were the denials by the unsuccessful candidate, but the court noted that ample evidence in the record could support a finding that the principal charges were false. Id. at 2692. After an independant review of the evidence, the court found actual malice based in part on analysis of whom the newspaper chose to interview. Those decisions coupled with other evidence convinced the court that the newspaper had serious doubts and acted with actual malice Thus, although the standard is expressed as "subjective," independant review of the evidence and inferring from that evidence that the newpaper acted with reckless disregard requires something more than a mere assertion of "genuine feelings" to avoid a finding of actual malice. Under Harte-Hanks, then, a mere assertion of genuine feelings would not have been enough.

APPENDIX B

GENERAL FINDINGS OF THE REFEREE OF THE MINNESOTA SUPREME COURT IN MATTER OF GRAHAM, NO. C3-88-1760, ENTERED ON FEBRUARY 21, 1989

The referee is completely satisfied that the respondent made false and damaging statements concerning two judges, a public official, and many attorneys. The referee is further satisfied that these statements were made without any reasonable basis in fact and without a prudent and complete investigation. It further appears that, at least in part, respondent was motivated by malice and a desire to retaliate against imagined wrongs directed at himself. At best, respondent took a scrap of cocktail party conversation and extrapolated it to form an unsubstantiated hypothesis. Few attorneys would have such a sense of self-importance as to think two judges and many attorneys would conspire in order to defeat them on a relatively minor case. Respondent

did feel this way, and the referee is satisfied that his feelings are genuine.

APPENDIX C

ORDER OF THE MINNESOTA SUPREME COURT IN MATTER OF GRAHAM, NO. C3-88-1760, DENYING PETITION FOR REHEARING, ENTERED ON MAY 1, 1990

Based upon all the files, records, and proceedings herein,

It is hereby ordered that the petition of John Remington Graham for rehearing be, and the same is, denied.

It is further ordered that judgment including impositions of costs not be, and the same is not, stayed.

It is further ordered that the motion by John Remington Graham to be excused from taking the professional responsibility exam be, and the same is, denied.

It is further ordered that all other motions accompanying John Remington Graham's petition for rehearing be, and the same are, denied.

/s/ Peter S. Popovich,
Chief Justice

APPENDIX D

FORMAL CHARGES AGAINST THE PETITIONER
BY DISCIPLINARY COMPLAINT,
FILED, AUGUST 17, 1988

T. Graham's statements in Exhibits 3, 4, and 5 that John A. Spellacy (referred to as a "state district judge" in Exhibit 5) participated in a conspiracy to prejudice the Shockman v. Rathke case, by using purported "political connections" by purportedly making prejudicial remarks [to Magistrate McNulty] about the suit and counsel bringing it for the plaintiffs," and otherwise are false statements regarding the integrity of a judge, made without basis in fact and with reckless disregard for the statements' truth or falsity, in violation of Rule 3.1, 8.2(a), and 8.4(d), Rules of Professional Conduct.

U. Graham's statements in Exhibits 3, 4, and 5, that a conspiracy arose to prejudice the Shockman v. Rathke case "at the request of Stephen Rathke" are false statements concerning the integrity of a

public legal officer, made without basis in fact and with reckless disregard for the truth or falsity of the statements, in violation of Rules 3.1, 8.2(a), and 8.4(d), Rules of Professional Conduct.

V. Graham's statements in Exhibits 4 and 5, under oath as of his "certain knowledge," that Magistrate Patrick J. McNulty participated in a conspiracy to prejudice the Shockman v. Rathke case are false statements made by Graham without basis in other than the report of Bruce Alderman, made with reckless disregard for the truth or falsity of the statements in violation of Rules 3.1 and 8.4(d), Rules of Professional Conduct.

W. Graham's statements in Exhibits 4 and 5, under oath and of his "certain knowledge," that Michael Milligan participated in a conspiracy to prejudice the Shockman v. Rathke case are false statements made by Graham without basis other

than the report of Bruce Alderman, and made with reckless disregard for the truth or falseity of the statements in violation of Rules 3.1 and 8.4(d), Rules of Professional Conduct.

EXHIBIT 3

TEXT OF A LETTER FROM THE PETITIONER, DATED FEBRUARY 16, 1988, TO JEROME ARNOLD, UNITED STATES ATTORNEY FOR MINNESOTA

Dear Sir,

In discharge of my obligations under 18 U. S. C., Section 4, I hereby report to you feloneous acts against the United States:

I allege that, at some time between December 9 and 14, 1987, Michael Milligan, a lawyer practicing in St. Cloud, then representing Stephen Rathke, the Crow Wing County Attorney, contacted John Spellacy, a state district judge living in Grand Rapids, and, in consequence of the ensuing conversation, Judge Spellacy contacted Patrick J. McNulty, a federal magistrate in Duluth, and

then and there corruptly secured a commitment from Judge McNulty to decide the pending case of Shockman v. Rathke, No. CV-5-87-260, without regard to the law and the facts, and, between January 4 and 21, 1988, Judge McNulty carried out his commitment, all of which was done with the knowledge and consent, and at the request of Mr. Rathke. Political connections were the modus operandi of these crimes.

I maintain that the foregoing acts of Mr. Milligan, Mr. Rathke, and Judge Spellacy constitute obstruction of justice and/or conspiracy to obstruct justice, contrary to 18 U. S. C., Sections 371 and 1503, as well as acts and conspiracy against civil rights, contrary to 18 U. S. C., Sections 241 and 242.

I allege further that Charles Steinbauer, a law partner of Mr. Rathke, was an accessory after the fact of these crimes, contrary to 18 U. S. C., Section 3, or is

guilty of misprision of felony with respect thereto, contrary to 18 U. S. C., Section 4.

I enclose herwith a running commentary of my observations written on January 25 and 28, 1988, and February 15 and 16, 1988, in which I set forth facts, circumstances, and information within my knowledge, and on which I make the foregoing allegations of criminal wrongdoing against the United States.

I request an impartial investigation by the Federal Bureau of Investigation.

The essential particulars are these:

-- On December 9, 1987, a motion for temporary injunction was made before Judge McNulty in Shockman v. Rathke, No. CV-5-87-260. The motion fully set forth the allegations to be proved, the proposed method of proof, the theories of law on which the suit was based. Judge McNulty cordially received the motion, found it prima facie meritorious, and, in lieu of a temporary

injunction, ordered early trial before him on January 4, 1988. Mr. Milligan ardently opposed the motion for temporary injunction, and was not happy with the resulting order for early trial.

-- On December 14, 1987, Judge Spellacy wrote Mr. Milligan, acknowledging contact and communication between them relative to the pending case of Shockman v. Rathke.

-- On December 14, 1987, Mr. Steinbauer related to one Bruce Alderman, a lawyer of good reputation in Brainerd, that Mr. Milligan, acting as counsel for Mr. Rathke, had telephoned a state jurist of high standing, who in turn contacted Judge McNulty, and secured from him a commitment to decide the case against the plaintiff and in favor of the defendent in the pending case of Shockman v. Rathke, without regard to the law and the facts. Circumstantial evidence indicates that the state jurist was Judge Spellacy.

-- From January 4 through 21, 1988, Judge McNulty displayed a complete reversal of attitude and concept concerning the case, without forewarning or explanation, and decided in the manner in which Mr. Steinbauer related it would be decided in his conversation with Mr. Alderman on December 14, 1987.

-- From January 4 through 21, 1988, the conduct of Mr. Milligan was boldly irregular, but evidenced supreme confidence as to what he knew would happen.

-- It is of critical important that Mr. Alderman receive protection so that he may speak freely with investigating agents.

I can assure you of the cooperation of a number of distinguished citizens.

I am forwarding copies of this letter and the enclosure to Douglas W. Thomson, Esq., who is my personal counsel, and to Mr. Mark Shields, who is the superintendant of the Minnesota Bureau of Criminal Apprehension. Both of these gentlemen will be con-

tacting you in the near future.

Respectfully yours,

/s/ John Remington Graham

EXHIBIT 4

TEXT OF THE PETITIONER'S COMPLAINT SWORN ON MARCH 22, 1988, ADDRESSED TO THE CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FOR REFERENCE TO THE JUDICIAL COUNCIL PURSUANT TO 28 U. S. C., SECTION 372(c)

Comes now the complainant pursuant to Rule 2 for the Rules for Processing of Complaints of Judicial Misconduct, and he shows the following particulars to the Chief Judge of this Court, to wit:

1. The complainant has been a member of the bar of this court for about twenty years, and he has also been admitted to practice, either generally or pro hac vice, before some thirty other courts of judicature throughout the United States. His name, address, and telephone appear beneath his signature hereinafter set forth.

2. The judicial officer complained against for having engaged in conduct prejudicial to the administration of justice is Hon. Patrick J. McNulty, United States Magistrate in and for the District of Minnesota.

3. The complainant states of his certain knowledge, on the basis of evidence in his possession, and called to his attention by responsible citizens, that between December 9 and 11, 1987, Judge McNulty was corruptly influenced, not with money or tangible things of value, but by means of political connections and illicit persuasion, to decide the case of Michael Shockman v. Stephen Rathke, No. CV-5-87, then pending before the United States District Court for Minnesota, without regard to the law and the facts, but according to a preconceived plan which was designed to make it falsely appear that the complainant, as counsel for the plaintiff, had caused the suit to be

brought in bad faith as the real party in interest, using his clients merely as personal instruments, solely for the purpose of harassing and embarrassing Mr. Rathke who serves as Crow Wing County Attorney. In consequence of such corrupt influence, the said Judge McNulty agreed to dismiss the suit so as to prejudice the rights of Mr. Shockman, and to order many thousands of dollars in attorney's fees to be paid by the complainant.

Specifically, it can be proved with direct and circumstantial evidence that Michael Milligan, a lawyer in the Quinlivan Law Firm in St. Cloud, Minnesota, acting as counsel for and with the knowledge and consent of Mr. Rathke and certain others, contacted Hon. John Spellacy, a state district judge living in Grand Rapids, Minnesota, at some point between December 9 and 11, 1987, -- that Mr. Milligan and Judge Spellacy then and there agreed upon a plan

whereby Judge Spellacy would contact Judge McNulty, by making prejudicial remarks about the suit and counsel bringing it for the plaintiffs, to decide the case in the manner alleged, -- that Judge Spellacy then contacted Judge McNulty, and extracted from him a commitment to decide the case in the manner alleged, -- and that Judge McNulty carried out a substantial part of his commitment between January 4 and 21, 1988, following which key particulars were called to the attention of the complainant by responsible citizens, including a certain member of the Minnesota Bar to whom critical revelations had been made by a law partner of Mr. Rathke on December 11, 1987.

Specifically, the said law partner of Mr. Rathke related important details of the way the corrupt influence just related was brought to bear, and ample circumstantial evidence perfectly supports this revelation. It was in fact known to Mr. Rathke,

Mr. Milligan, and Judge Spellacy, Judge McNulty, and other how the case would be decided some three weeks before the opening of the trial on January 4, 1988, all in consequence of corrupt influence hereinabove complained of.

Pursuant to his duties as a citizen under 18 U. S. C., Section 4, the complainant has reported particulars to Jerome Arnold, United States Attorney in and for the District of Minnesota.

An investigation of such particulars is underway under the aegis of the Federal Bureau of Investigation. Whether or not any indictments will be sought or returned is not and cannot be known to the complainant, who nevertheless states that the essentials of the evidence reported by him to Mr. Arnold, including the fact of the said revelation made on December 11, 1987, appear to have been confirmed during the course of the said investigation.

4. Having acted as counsel in the said case of Shockman v. Rathke, the complainant was not represented at the time the said corrupt influence was brought to bear, nor was he aware of such corrupt influence at such time. However, the complainant has since retained counsel, viz., Douglas W. Thomson, Esq., 345 St. Peter Street, St. Paul, Minnesota 55101, whose telephone is 612-227-0856

5. The complainant has not initiated any other proceedings against Judge McNulty.

Wherefore, the complainant prays that your Honor certify this complain to a special committee for investigation and report under Rules 3, 5, and 6 of the Rules for the Processing of Complaints of Judicial Misconduct, and that the Judicial Council remove Judge McNulty from office for high crimes and misdemeanors, and for conduct prejudicial to the administration of justice, as allowed

by Rule 7 of the Rules for Processing of Complaints of Judicial Misconduct.

/s/ John Remington Graham

(Verification Omitted)

EXHIBIT 5

TEXT OF THE AFFIDAVIT OF THE PETITIONER SWORN ON MARCH 24, 1988, IN SUPPORT OF THE MOTION MADE AND FILED BY HIS COUNSEL IN THE UNITED STATES DISTRICT COURT OF MINNESOTA UNDER 28 U. S. C., SECTION 455, FOR RECUSAL OF JUDGE McNULTY IN SHOCKMAN V. RATHKE, NO. CV-5-87-260

John Remington Graham, being first duly sworn on oath, deposes and says:

1. I have served as counsel for the plaintiffs in this suit throughout all stages from commencement to the present moment.

2. Of my certain knowledge I state that Hon. Patrick J. McNulty, United States Magistrate has a personal bias against me and should not further participate in these proceedings. I therefore request that he disqualify himself from any further participation in these proceedings.

3. On the basis of evidence within my possession and called to my attention by responsible citizens I state of certain knowledge that the following events have occurred, to wit:

Within seventy-two hours of the opening of business on December 9, 1987, Michael Milligan acting as counsel for the defendant, contacted a certain state district judge whose identify is known to me. The said state district judge in response to the request of Mr. Milligan contacted the said Judge McNulty and secured from him a commitment to decide his case against the plaintiffs and additionally to assess attorney's fees against me. All of this was done with the knowledge and consent of Mr. Rathke and certain other persons. A commitment by the said Judge McNulty was accordingly made fully three weeks before the beginning of trial on January 4, 1988. Upon learning of the essential facts from and after January

23, 1988, I have been in the process of fil-filling my statutory obligations as a citizen under 18 U. S. C., Section 4, and M. R. P. R., Rule 8.3. Under these circumstances the impartiality of said Judge McNulty may be reasonably questioned for purposes of 28 U. S. C., Section 455

/s/ John Remington Graham

(Verification Omitted)

NOTE: The accompanying motion, which, together with the foregoing affidavit, may be identified as respondent's item 34 in Minnesota Supreme Court File No. C3-88-1760, reads in pertinent part, "John Remington Graham, by and through his attorney, Douglas W. Thomson, hereby moves the court (Hon. Patrick J. McNulty), pursuant to 28 U. S. C., Section 455, to disqualify himself from presiding at the hearing on the motion of defendant for attorney's fees, due to personal bais and prejudice concerning John Remington Graham," etc.

APPENDIX E

ORDERS ENTERED BY THE UNITED STATES DISTRICT COURT FOR MINNESOTA IN SHOCKMAN V. RATHKE, NO. CV-5-87-260, FOLLOWING THE MOTION OF PETITIONER'S COUNSEL FOR RECUSAL OF JUDGE McNULTY

ORDER OF JUDGE McNULTY, APRIL 19, 1988

The undersigned United States Magistrate hereby recuses himself from participation in any further proceedings in this matter, and requests Hon. Robert G. Renner to vacate the order of reference and to personally reassume this case assignment for all future proceedings.

ORDER OF JUDGE RENNER, JUNE 29, 1988

Based on the arguments of counsel, the file and record and the court's bench ruling, it is hereby ordered that the defendant's motion for attorney's fees, costs, and disbursements is hereby denied.

APPENDIX F

PLEAS OF JUSTIFICATION IN THE PETITIONER'S ANSWER TO THE DISCIPLINARY COMPLAINT FILED AGAINST HIM ON AUGUST 17, 1988

47. The key evidence in this matter is the testimony of Mr. Alderman concerning the conversation he had with Mr. Steinbauer on December 11, 1987, at the Christmas party of the Crow Wing-Aitkin County Bar Association. Mr. Alderman gave sworn testimony concerning this incident in a deposition taken by the Director on May 2, 1988. This testimony corroberates the representations of the Respondent as to the subject matter thereof. On pages 15 and 16 of the said deposition, Mr. Alderman related what he was told by one of the law partners of Mr. Rathke at the party on December 11, 1987:

> "Q. Would you tell us then what it was you heard said by Mr. Steinbauer or Mr. Krueger that was later restated to Mr. Graham?
>
> "A. Well, we were talking about the Shockman case and the statement was made to the effect that Mr. Milligan had telephoned someone, and a name was

mentioned, and I don't remember the name that was mentioned, and that person called the judge in Duluth and that everything had been taken care of or it was in the bag or words to that effect. The person I was speaking with indicated that he would not be surprised if attorney's fees were imposed against Mr. Graham as a result of those proceedings.

"Q. Is it your impression that it was Mr. Steinbauer who spoke those words?

"A. To the best of my recollection, I think it was. I have given a lot of thought to this and I cannot categorically state that it was Mr. Steinbauer, but, if it was not Mr. Steinbauer, then it would have been Mr. Krueger."

On further inquiry, Mr. Alderman gave focus to names mentioned, as appears on pages 18 through 20 of the transcript:

"Q. Now, Mr. Milligan is the person's name that was used as someone who telephoned someone else?

"A. Yes.

"Q. And what was the name of the person he called?

"A. I remember two of the three names. I remember the name of Michael Milligan being given as the person who made the telephone call, and I remember that it was either the judge in Duluth who was ultimately called or Judge McNulty. I don't know if Judge McNulty was named

by name or if he was referred to as the judge in Duluth. I can't be sure about that.

"Q. I would like to break this statement down into parts, if we can.

"A. All right.

"Q. The first part is that Mr. Milligan called on the telephone?

"A. Yes

"Q. And that someone was identified, but you don't recall it now, is that correct?

"A. The name was said and either the name was not familiar to me or I have forgotten the name that was mentioned.

"Q. The name was definitely mentioned?

"A. Yes, it was.

"Q. And that person, whose name you cannot recall, was then said to have spoken to the Duluth judge or Judge McNulty?

"A. Yes.

"Q. Did you know this was the Shockman case, was it identified specifically?

"A. We had been talking about the Shockman case immediately prior to the statement that was made, so that statement, I believe, was in obvious reference to the Shockman case that was coming up for trial hearing in Duluth."

Depositions and affidavits in the possession of the Director show that Mr. Steinbauer claims he has no independent recollection of the statement attributed to him, but that the wife of Mr. Steinbauer overheard the conversation between Mr. Steinbauer and Mr. Alderman. She claims the talk at the table was to the effect that the Respondent is paranoid and would soon think "we have a fix in with the judge," etc. Here is how Mr. Alderman testified about this on pages 21 and 22 of the said deposition of May 2, 1988:

> "Q. Getting back to what was actually said, there were words to the effect that it was in the bag or everything had been taken care of?
>
> "A. Yes.
>
> "Q. You don't recall the precise language?
>
> "A. I don't recall the precise words, but it was the meaning of the words, that was the impression that I got, that everything was taken care of, it was in the bag, the fix is on, something to that effect. I don't recall the exact words, but they were words

to that effect.

"Q. Is it possible that Mr. Steinbauer was speaking about a possible accusation by Mr. Graham, and he in fact might have made the statement, the next thing you know Mr. Graham will be accusing us of, and then he went on to make the statement that you heard, as you have described, is that possible?

"A. I don't believe so."

On page 30 of the said deposition of May 2, 1988, Mr. Alderman clarified the problem of the attributes of the middle man who had been contacted by Mr. Milligan and then contacted Judge McNulty:

"Q. You understand from Graham's own understanding of your conversation with him that you said the person was either a judge or someone else who had clout or political connections?

"A. Yes.

"Q. Did you understand Steinbauer to say anything about political connections.

"A. No.

"Q. Or any other type of clout?

"A. Well, I either knew this person, it seems to me that I either knew this person, that I was familiar with the name, or it was mentioned in such a way

that I got the impression that the person had some kind of clout or had some kind of influence with Judge McNulty in Duluth, and would have been able to talk Judge McNulty into seeing things his way, or whatever.

"Q. So, it is your belief that the that name was mentioned to you, by Steinbauer, was either a name you recognized as someone having clout or it was mentioned to you that this person had some clout or some political influence?

"A. Yes, that was my general impression."

48. The said testimony of Mr. Alderman is reliable, because it is free of those traits which render testimony concerning confessions dubious. Mr. Steinbauer, as declarant, was not misled by artifice or trick, was not subjected to coercion or duress, and was not speaking subject to hope or promise of favor. Mr. Alderman had nothing to gain in coming forward, nor any motive to falsify his testimony. He is a reputable citizen. He understood and recalled clearly enough what was said to him. And the testimony was given under oath.

49. The said testimony of Mr. Alderman is admissible under three theories of evidence. Under Rule 801 of the Federal Rules of Evidence, the testimony is admissible as an admission of an agent of Mr. Rathke, and as the admission of a co-conspirator, viz., Mr. Steinbauer. Under Rule 804 of the Federal Rules of Evidence, the testimony is admissible as a statement against interest, because Mr. Steinbauer has indicated his lack of independent memory, hence he as declarant is not available.

50. The said testimony of Mr. Alderman reasonably shows there was a criminal conspiracy within the meaning of 18 U. S. C., Section 371, because it indicates that Mssrs. Steinbauer and Milligan both knew and approved of a determined course of action to accomplish an obstruction of justice within the meaning of 18 U. S. C, Section 1503, and that, therefore, there must have been and was a meeting of minds to accom-

plish an illegal objective, viz., corrupt influence of the due administration of justice in federal court, -- and because it further indicates that at least one of those involved took at least one step toward the illegal objective, i. e., Mr. Milligan made a telephone call.

51. The said testimony of Mr. Alderman reasonably shows Mr. Rathke was involved, because Mr. Rathke as county attorney was the primary beneficiary of the obstruction of justice, -- because further Mr. Rathke was working closely on the case with his counsel, Mr. Milligan, -- because further Mr. Milligan knew about and participated in the conspiracy, -- and because further Mr. Steinbauer, a law partner of and assistant county attorney under Mr. Rathke, who was not working on the case at all, knew and approved of the conspiracy, -- and because Mr. Rathke sat at the same dinner table when Mr. Steinbauer

made his revelations to Mr. Alderman. Under these circumstances, it is impossible to draw any other conclusion than that Mr. Rathke knew and approved of the conspiracy.

52. The said testimony of Mr. Alderman expressly implicates Mr. Milligan, Mr. Steinbauer, and Judge McNulty, and a certain but unnamed middle man who had two attributes, viz., he was powerful and influential, and he was close to Judge McNulty.

53. The alibi or explanation given by the wife of Mr. Steinbauer is so innerently implausible as to be unworthy of belief, and Mr. Alderman excluded the possibility, on the basis of what he heard and observed, that such alibi or explanation could be true.

54. On page 13 of his sworn deposition given to the Director on May 27, 1988, Mr. Wieland clearly related what Mr. Alderman understood the remarks of Mr. Steinbauer to mean, viz., "There is a fix on the case."

55. On page 9 of his determination that no discipline is warranted against Mssrs. Rathke and Milligan, the Director stated that the remarks of Mr. Steinbauer to Mr. Alderman on December 11, 1987, "suggest great confidence, but not corruption," and this is an important premise of his petition against the respondent. Mr. Alderman understood the remarks of Mr. Steinbauer to mean that corrupt influence had been brought to bear on the federal court. The plainest and obvious meaning of the said testimony of Mr. Alderman is that corrupt influence had been brought to bear on the federal court. Not even Mr. Steinbauer or his wife has suggested such an alibi or explanation as the Director has proposed.

56. The remarks of Mr. Steinbauer to Mr. Alderman are corroberated by circumstantial evidence of the corpus delicti, to wit:

First, on December 9, 1987, Judge

McNulty entered an order for early trial, which necessarily meant that, in view of the testimony offered by way of supporting affidavits and the law as stated in supporting memorandum, the plaintiffs had a reasonable chance of prevailing on the merits, i. e., such testimony appeared to be relevant and probative, and such law appeared to sustain the prayer for relief. The trial brief for the plaintiffs submitted on order of Judge McNulty merely expanded upon the same evidence and law. Following the confession of corrupt influence, as related by Mr. Steinbauer to Mr. Alderman on December 11, 1987, i. e., from and after January 4, 1988, Judge McNulty's attitude and concept changed suddenly and radically without warning, leading to rulings on evidence and law against the plaintiffs, which were entirely contrary to what he had initially approved in principle on December 9, 1987.

Secondly, Mr. Milligan neither pleaded nor tried the defense that the Respondent was the real party in interest, and was merely using his clients in bringing this suit to harass and embarrass Mr. Rathke. Yet, in his final submission in writing, Mr. Milligan advanced such a defense, causing great surprise and prejudice, contrary in the extreme to allowable practice in federal courts, and, despite motions to disallow such tactics, Judge McNulty permitted such irregularity, which never would have occurred in normal circumstances. This is part of the corpus delicti following upon the revelations of corruption by Mr. Steinbauer to Mr. Alderman on December 11, 1987.

57. The allegations of the Respondent that corrupt influence had been brought to bear on the federal court were, therefore, founded upon a reliable and admissible confession supported by circumstantial

evidence of the corpus delicti, hence a prima facie case sufficient for an indictment and conviction for several federal crimes, and for subcongressional discipline of a federal judge, unless such evidence should be adequately contradicted, impeached, or explained. The Director has found nothing which adequately contradicts, impeaches, or explains such evidence, but has found much which confirms such evidence.

58. From the circumstances of this case, it can be inferred that the certain but unnamed middle man mentioned by Mr. Steinbauer in conversation with Mr. Alderman on December 11, 1987, had five attributes: first, he was a man with power and influence, as related to Mr. Alderman; secondly, he was a man close to Judge McNulty, as related to Mr. Alderman; thirdly, he must have been easily accessible to Mr. Milligan and/or Mr. Rathke, because significant progress, i e., either actual con-

tact or firm assurances of contact, must have already been made toward the illegal ends by the early evening of December 11, 1987, only two days after the order for early trial entered by Judge McNulty on December 9, 1987; fourthly, he must have been willing to take extreme measures in behalf of Mr. Milligan and/or Mr. Rathke, because what he did in contacting Judge McNulty was of an extreme nature; and fifthly, he probably had strong feelings or prejudice against the Respondent or his clients, because otherwise he would have been less inclined to take extreme measures. The class of persons defined by these five attributes must be so small that, if one individual clearly fits this unusual description, and there is no evidence that anyone else is characterized by these attributes, it may be inferred with moral certainly that such individual was in fact the middle man referred to by Mr. Steinbauer in con-

versation with Mr. Alderman on December 11, 1987.

59. Judge Spellacy clearly fits the description of this class:

First, it is indisputable that Judge Spellacy is powerful and influential.

Secondly, as Judge Spellacy has related to the Director, and as Judge McNulty stated from the bench on January 4, 1988, during the trial of Shockman v. Rathke, Civ. No. 5-87-260, Judge Spellacy and Judge McNulty went to law school together, and were old friends over the years.

Thirdly, it is indisputable that the son of Judge Spellacy is a law partner of Mr. Milligan, and that Judge Spellacy regularly sees Mr. Rathke in connection with criminal prosecutions in the Ninth Judicial District, especially in Crow Wing County.

Fourthly, as related by Mr. Rathke on page 28 of his sworn deposition given to the Director on May 2, 1988, and as related

on the transcript of the grand jury proceedings called by Judge Spellacy on petition of Mr. Rathke, for November 4 and 10, 1987, it is clear that Judge Spellacy wanted to see the Respondent investigated and indicted for criminal defamation on account of the critical remarks concerning Mr. Rathke found in the letter of the Respondent to Mary Koep on October 1, 1987. In light of the opinions of the Justices of the United States Supreme Court in New York Times v. Sullivan, 376 U. S. 254 (1964), and Garrison v. Louisiana, 379 U. S. 64 (1964), the expressed desires and explicit statements of Judge Spellacy concerning grand jury investigation and indictment of the Respondent for his criticisms of Mr. Rathke were wholly unrealistic, and, in any event, were extreme in the highest degree. While the Respondent does not abandon his reasoning concerning the sexual misconduct of Mr. Milligan while Cass County Attorney and the probable knowledge of Judge

Spellacy concerning those events, as set forth in part 8 of his affidavit of May 9, 1988, he will lay that point aside for a moment, since there are some equivocal circumstances have become known since the date of that affidavit, and, in any event, as case can easily be made that Judge Spellacy is characterized by the fourth attribute without any reference to the episode.

Fifthly, the conduct of Judge Spellacy in seeking an investigation and indictment of the Respondent for criminal dafamation on account of his criticism of Mr. Rathke likewise shows that Judge Spellacy had strong feelings and prejudice against the Respondent.

There is no evidence that anyone else fits the description of the middle man. Therefore, it may be inferred with moral certainty that Judge Spellacy was in fact the middle man.

60. On March 25, 1988, the Respon-

dent signed and filed his affidavit in support of the motion for the disqualification of Judge McNulty. The said affidavit does not mention the name of Judge Spellacy as the middle man whom Mr. Milligan had telephoned. However, the counteraffidavit of Mr. Milligan denies any improper contact with Judge Spellacy. This has the value of an excited utterance, and amounts to a tacit admission that Judge Spellacy was the middle man. Mr. Milligan has tried to explain his automatic mention of Judge Spellacy by reference to conduct of the Respondent as party to litigation in this State, claiming that the Respondent always attacks those against him. In one case, the Respondent ultimately prevailed in the Minnesota Court of Appeals, which sustained his grievance, although Mr. Milligan did not mention the fact. In other litigation mentioned, the ultimate objective of the Respondent was to secure an institutional hearing to determine

his rights of academic freedom as a law professor. Under these circumstances, the explanation of Mr. Milligan for his mentioning the name of Judge Spellacy is so inherently implausible that it tends to confirm an interpretation of the statements of Mr. Milligan as an tacit admission.

61. On pages 40-41 of his sworn depostion given to the Director on May 10, 1988, Mr. Milligan admitted that, with the assistance of the son of Judge Spellacy, he telephoned the chambers of Judge Spellacy in Grand Rapids on the morning of December 10, 1987. The Director has advised the Respondent that Judge Spellacy stayed at the Sheraton Midway Hotel in St. Paul on December 10, 1987. On pages 8-9 of his sworn deposition given to the Director on May 2, 1988, Mr. Rathke stated that he stayed at the Sheraton Midway Hotel in St. Paul on December 10, 1987. On pages 9-11 of his sworn deposition given to the Director on May 2, 1988, Mr.

Rathke stated that he saw Judge Spellacy twice during the day on December 11, 1987. It was on the evening of December 11, 1987, that Mr. Steinbauer made his revelations to Mr. Alderman that Mr. Milligan had telephoned a certain middle man, whose description only Judge Spellacy fits, and who had contacted, or perhaps would contact Judge McNulty, and that, consequently, the case was "in the bag, taken care of, the fix is in," etc.

62. Judge Spellacy has come forth with certain denials, alibis, explanations, and excuses, but these should not be given credence, because on several occasions Judge Spellacy has made certain solemn representations which he knew were not true. It is an established rule of law that, if a trier of fact finds that a witness was untruthful concerning what he has said about one fact in the case, the inference may be drawn that he was likewise untruthful in his testimony regarding another aspect of the case. On page 28 of the

sworn deposition given by Mr. Rathke to the Director on May 2, 1988, it is related that, at the time the grand jury in Crow Wing County was about to start its investigation, of Michael Shockman, Judge Spellacy personally spoke with Mr. Rathke, when the Respondent was not present, and urged that the Respondent be investigated for criminal defamation. During the course of those grand jury proceedings on November 10, 1987, Judge Spellacy, in response to legitimate inquiry by the Respondent emphatically and angrily denied ever having spoken with Mr. Rathke about a grand jury investigation of the Respondent for criminal defamation. Again, during his testimony under oath on January 4, 1988, in the case of Shockman v. Rathke, Civ. No. 5-87-260, Judge Spellacy stated that he learned of the investigation of the Respondent by the said grand jury for criminal defamation only after the said grand jury was discharged. And, as the Director is

aware, Judge Spellacy has stated to him under oath during his sworn deposition given on June 16, 1988, that his only comments about an investigation by the said grand jury of the Respondent for criminal defamation were in the presence of the Respondent on November 4 and 10, 1987.

63. Other facts and circumstances can be shown by available evidence to support the claims of the Respondent complained of in paragraphs T, U, V, and W of the Petition.

APPENDIX G

TEXT OF THE PETITIONER'S MOTION FOR PERMISSION TO ORDER A TRANSCRIPT FILED ON APRIL 29, 1989

Pursuant to MRCAP Rule 27, comes now the respondent and he makes the following motions, to wit:

First: That the court permit the respondent to order a transcript of the hearing before the referee and/or to do whatever appears necessary to contest in a lawful manner the findings, conclusions, and recommendations of the referee . . . So moved for reasons set forth in the attached affidavit of the respondent [which proceeds to state that] the referee has not notified me of his findings, conclusions, and recommendations.

(Signatures and Verification Omitted)

APPENDIX H

ORDER OF THE MINNESOTA SUPREME COURT
IN MATTER OF GRAHAM, NO C3-88-1760,
DENYING SUMMARY DISMISSAL
ENTERED ON NOVEMBER 17, 1989

Based upon all the files, records, and proceedings herein,

It is hereby ordered . . . that the motion of respondent to summarily dismiss these proceedings be, and the same is, denied.

By the Court:

/s/ Peter S. Popovich,
Chief Justice